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No. 91-1847

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

MAYNARD B. MILLER,
Petitioner,

vs.

ROBERT BRIGGS and GRACE BRIGGS,
Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether notice to a bankruptcy trustee, without constructive notice to the world, of a deed of trust on bankruptcy estate realty, can defeat the bankruptcy trustee's bona fide purchaser rights under 11 U.S.C. § 544(a)(3). His rights under 11 U.S.C. §§ 544(a)(1) and/or (2)?

2. Whether the filing of a bankruptcy petition in bankruptcy court provides constructive notice to the world of the recitals in such petition.

3. If the same filing that perfects the bankruptcy trustee's title to debtor's realty also provides constructive notice of a security interest on that realty, does the trustee's title or the security interest have priority?

4. Whether the phrase "supposedly secured by assignments of Deeds of Trust," in describing a claim against a bankruptcy estate, provides notice of a deed of trust against specific bankruptcy estate realty.

QUESTIONS PRESENTED

(continued.)

5. Whether the de novo standard of review, rather than the clearly erroneous standard of review, should be used when reviewing a summary judgment. When reviewing a bankruptcy court determination of state law.

6. If the filing of a bankruptcy petition serves to perfect a security interest on bankruptcy estate realty, does such a filing constitute a "transfer" of that security interest for purposes of 11 U.S.C. § 547(b), the preference provision?

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OPINION BELOW

The opinion petitioner now asks this Court to review is reported as In Re Professional Investment Properties of America, Inc., 955 F. 2d 623 (9th Cir. 1992). A2-A26.

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment in this matter on January 30, 1992, and denied petitioner's motion for rehearing on April 27, 1992. A1. Per 28 U.S.C. § 2101(c) and Rule of the Supreme Court 13.4 this petition for a writ of certiorari was required to be filed within ninety days after April 27, 1992, the date of entry of the Court of Appeals order denying rehearing. This petition being so timely filed this Court is vested with jurisdiction of this matter under 28 U.S.C. § 1254.

STATUTES

11 United States Code section 544(a):

(a) The trustee shall have, as of the

commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

(1) a creditor that extends credit to the debtor at the time of he commencement of the case, and that obtains, at such time and with rspect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor

exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such a transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 United States Code section 547(b):

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the

petition;

or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider;

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 United States Code section 549(c):

(c) The trustee may not avoid under subsection (a) of this section a transfer of real property to a good faith purchaser without knowledge of the

commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to the interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

Revised Code of Washington sec. 4.28.325 :

In an action in a United States district court for any district in the state of Washington affecting the title

to real property in the state of Washington, the plaintiff, at the time of filing the complaint, or at any time afterwards, or a defendant, when he sets up an affirmative cause of action in his answer, or at any time afterward, if the same be intended to affect real property, may file with the auditor of each county in which the property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action and a description of the real property in that county affected thereby. From the time of the filing only shall the pendency of th action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded shall be deemed a subsequent purchaser or encumbrancer, and shall be bound by all proceedings taken after the filing of such notice to the same extent as if he were a party to the action. For the purpose of this section an action shall be deemed to be pending from the time of filing such notice: Provided, however, That such notice shall be of no avail unless it shall be

followed by the first publication of the summons, or by personal service thereof on a defendant within sixty days after such filing. And the court in which the said action was commenced may, in its discretion, at any time after the action shall be settled, discontinued or abated, on application of any person aggrieved and on good cause shown and on such notice as shall be directed or approved by the court, order the notice authorized in this section to be canceled of record, in whole or in part, by the county auditor of any county in whose office the same may have been filed or recorded, and such cancellation shall be made by an indorsement to that effect on the margin of the record.

Revised Code of Washington sec. 65.08.070:

A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real

property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

STATEMENT OF THE CASE

Respondents and others filed an involuntary bankruptcy petition against Professional Investment Properties of America, Inc. on May 28, 1986. That petition included the following recital:

"The nature and amount of petitioners' claims are as follows:

a) ROBERT BRIGGS: Purchase of various Promissory Notes supposedly secured by assignments of Deeds of Trust with interest-only monthly payments which are now delinquent, some of said notes have matured and are unpaid, in the aggregate amount of approximately $137,500."

Nothing in the petition identified any parcel of real property; nothing in the petition referred to any specific deed of trust: the only reference to any

deed of trust was the language quoted above, i.e., that Robert Briggs held notes purchased from the debtor which notes were "supposedly secured by assignments of Deeds of Trust . . ."

Over one year later the respondents, the Briggs, filed an adversary proceeding alleging that they had loaned money to the debtor in October of 1985 in return for a promissory note and deed of trust on bankruptcy estate realty. Although that deed of trust was never recorded, or otherwise perfected, the Briggs asserted that the bankruptcy estate's title to said real property was subordinate to their deed of trust; that assertion was based on the aforesaid recital, "supposedly secured by assignments of Deeds of Trust," contained in the bankruptcy petition. The Briggs contention being that said recital provided timely constructive notice of the deed of trust.

The bankruptcy court, by summary judgment, and on the basis of the bankruptcy trustee's rights under 11 U.S.C. § 544(a), held that:

> Any constructive notice of plaintiffs' interest achieved by the filing of the original bankruptcy pleadings comes too late to secure their interest in a position prior to that acquired by the trustee. A46-A47

The district court, in reversing the bankruptcy court, stated:

> Under Washington law, this language is sufficient to put an ordinary prudent person on inquiry of the Briggs' interest in the real property in the form of a Deed of Trust. Certainly, the language creates a circumstance which raises a duty to require further inquiry by the trustee to determine if there is a Deed of Trust. A reasonably diligent inquiry would have disclosed the unrecorded deeds of trust. A40-A41

The bankruptcy trustee appealed the decision of the district court, and during the pendency of that appeal the trustee, as representative of the bankruptcy estate and pursuant to bankruptcy court order (A28-A30), sold to Maynard B. Miller the bankruptcy estate's title to the fund generated from a bankruptcy sale of the realty to which the deed of trust pertains; those funds are being held be the bankruptcy court pending the instant proceedings. By Circuit Court of Appeals order (A27) Maynard B. Miller was substituted as appellant for the bankruptcy trustee and for the bankruptcy estate. Your petitioner, Maynard B. Miller, as appellant, and Robert Briggs and Grace Briggs, as appellees, are the only parties to the proceedings in the Ninth Circuit below.

The Ninth Circuit, adopting the "findings" of the bankruptcy court, and

the reasoning of the district court, affirmed the district court and denied rehearing.

The bankruptcy court, the court of first instance below, had federal jurisdiction of this bankruptcy proceeding per 28 U.S.C. § 157 (a) & (b). The U.S. District Court had jurisdiction of the appeal from the bankruptcy court under 28 U.S.C. § 158 (a). The United States Court of Appeals had jurisdiction of the appeal from the district court per 28 U.S.C. § 158 (d).

ARGUMENT

QUESTIONS PRESENTED Nos. 1 and 2

The decision of the United States Court of Appeals for the Ninth Circuit in this matter is in square and direct conflict with the only United States Court of Appeals decision with which it is on all fours regarding questions presented one and two, the two most certworthy questions presented by this

petition. That decision, Cooper Grocery Co. v. Park, 218 Fed. 42 (5th Cir. 1914), has been followed, until the instant case, by every federal court that has issued one or more reported decisions which announce a holding regarding said questions presented: In Re Lindsey, 131 F. Supp. 11,13 (D.C. N.J. 1955); In Re Chappell, 77 F. Supp. 573,576 (D.C. Ore. 1948); Matter of Youngs Cornell Utilities, Inc., 20 F. Supp. 381,382 (D.C. N.Y. 1937); In Re Cobb, 14 F. Supp. 465,467 (D.C. Mich. 1936); Matter of Holley, 25 F. 2d 979, 980-981 (D.C. Iowa 1928); Matter of Douglas Lumber Co., 2 F. 2d 985, 987-988 (D.C. Wyo. 1924); and In Re Sayer Village Manor, Inc., 120 F. Supp. 215,216 (D.C. N.J. 1954).

In Cooper Grocery Co., supra, the Texas race-notice statute involved in that deed of trust case was, for all intents and purposes, identical to

Washington's RCW 65.08.070, supra p. 7. Cooper Grocery Co. was followed by the highest court of the State of Minnesota in Neils v. Bohlsen, 181 Minn. 25, 231 N.W. 248,249 (1930).

The most respected secondary authority on bankruptcy law, Collier, at 4B Collier on Bankruptcy ¶ 70.53 at pp. 638-640 (14th ed. supp. 1988) cites with approval the cases just cited herein for the proposition that notice to a bankruptcy trustee in his capacity as trustee will not serve to negate his rights under what is now codified as 11 U.S.C. §§ 544(a)(1) & (2). Collier, at p. 640, quoting from Matter of Youngs Cornell Utilities, Inc., supra, notes that it would be at least unreasonable to have the wording of a bankruptcy filing determine the priorities regarding bankruptcy estate property.

The Ninth Circuit's opinion below focuses on an irrelevant issue, which

leads to an erroneous conclusion. That opinion, at A2-A3, states: "In this bankruptcy case we are asked to decide under Washington law whether the contents of the Briggs' involuntary petition which forced the debtor into bankruptcy put the trustee on sufficient inquiry notice of the Briggs' interest under unrecorded instruments. If so, he may not invoke the avoidance powers provided by 11 U.S.C. § 544." (Emphasis added.) It was the Ninth Circuit that chose to make notice to the trustee pivotal to its decision, and so it focused on that issue throughout its opinion; e.g., A13, A16 and A20. The Ninth Circuit not only selected and focused on a legally irrelevant issue, it arrived at an erroneous conclusion regarding that issue.

The relevant issue is not whether the petition put the trustee on notice of the deed of trust, but whether the

filing of the petition served to give **to the world** constructive notice of the deed of trust so as to timely **perfect** tht deed of trust. The answer to that question, the question actually presented, is plainly a resounding "No". One need not go beyond the language of 11 U.S.C. 544(a) for that answer. Clearly the filing of the bankruptcy petition did not prevent the debtor from transferring title to the realty to bona fide purchase for value free of the deed of trust, so, per 11 U.S.C. §544(a)(3), the trustee received title free of the unperfected deed of trust, regardless of what notice thereof he may have been given. Not only does the plain language of the "governing" statutes so provide, but caselaw so holds. In Re Walker, 67 B.R. 811, 813 (Bkrtcy. C.D. Cal. 1986). The opinion of the Ninth Circuit below is discordant even with the law announced by this Court in United States

v. Speers, 382 U.S. 266, 275, 15 L. Ed. 2d 314, 320, 86 S. Ct. 411,416 (1965)(Cf. Corn Exchange Nat. Bank & Trust Co. v. Klauder, 318 U.S. 434, 87 L. Ed. 884, 63 S. Ct. 679 (1943)), as well as with all relevant Ninth Circuit decisions: Pacific Bank v. Coats, 205 F. 618, 624 (9th Cir. 1913); In Re Heide, 915 F. 2d 531 (9th Cir. 1990); In Re Staff Mortg. & Inv. Corp., 625 F. 2d 281 (9th Cir. 1980); and Martin v. Crocker-Citizens Nat. Bank, 349 F. 2d 580 (9th Cir. 1965). The law of the State of Washington also holds that if a security interest on bankruptcy estate property is not perfected before the bankruptcy petition is filed the bankruptcy trustee takes free of such security interest. First Guar. Bank v. Western Cross A. & M. Co., 139 Wash. 615, 247 P. 1027 (1926), and Dorsey v. Brunswick Corp., 69 Wn. 2d 511, 418 P. 2d 732 (1966). Decisions from each of

the other circuits also hold that unless a security interest on bankruptcy estate property is perfected before the bankruptcy petition is filed the trustee takes free of such security interest. In Re Maryville Sav. & Loan Corp., 760 F. 2d 119, 121 (6th Cir. 1985) and In Re Casbeer, 793 F. 2d 1436,1440 (5th Cir. 1986). Not only do the respondents admit that their deed of trust was not ever perfected (page 19 of Brief of Appellees filed with the Ninth Circuit.), but it plainly was not "perfected". In Re Freedlander, 107 B.R. 88,90 (Bkrptcy. E.D. Va. 1989). Only if the whole world is timely placed on constructive notice of a security interest on bankruptcy estate property does the bankruptcy trustee take subject to such security interest. In Re Weisman, 131 B.R. 148,153 (N.D. Cal. 1991); In Re Seaway Exp. Corp., 912 F. 2d 1125, 1128-1129 (9th Cir. 1990).

Although the basic focus should be on whether a security interest on estate property is perfected before the bankruptcy petition is filed, oftentimes constructive notice to the world of a security interest is required in order to perfect such an interest; sometimes constructive notice to the world can be provided by open and continuous possession, e.g., In Re Gulino, 779 F. 2d 546, 551 (9th Cir. 1985), and McCannon v. Marston, infra.

The proposition that a reference to a security interest in the initial bankruptcy court filing serves to give such notice of that interest to the trustee that he takes subject to such interest had been asserted, albeit unsuccessfully, with some frequency, but for nearly forty years now In Re Lindsey, supra, has stood at the end of an unbroken line of reported opinions

refuting said assertion. Now comes the Ninth Circuit and here accepts that thoroughly discredited, long dormant, and wholly unsound notice-to-trustee assertion so as to defeat the trustee's rights under 11 U.S.C. § 544(a).

Congress has repeatedly, over the years, statutorily strengthened and confirmed the law announced in Cooper Grocery Co. v. Park, supra. E.g., in 1978 Congress added the bona fide purchaser status to the rights of the trustee by the enactment of 11 U.S.C. § 544(a)(3); and in 1984 Congress confirmed the Cooper Grocery Co. rule by amending 11 U.S.C. §549 (c) to provide that the filing of a bankruptcy petition in bankruptcy court does not provide constructive notice, even of the bankruptcy estate's title to debtor's realty, even where the realty is in the same county as the bankruptcy court. The law has for so many years so clearly

provided that recitals in bankruptcy court filings do not serve to perfect security interests, the Ninth Circuit's decision below is at least astounding.

While the fact that the opinion of the Ninth Circuit is in direct conflict with other reported opinions may not alone cause this Court to grant certiorari, the reasoning supporting those other opinions should cause this Court to do so; as Collier, supra, noted, the rationales of those opinions "command respect". Further, Miller, in reliance on 11 U.S.C. §§ 544(a), 547(b) & 549(c), RCW 4.28.325 and RCW 65.08.070, Cooper Grocery Co., supra, Collier, supra, and the rest of the law, purchased the bankruptcy estate's lawful right to the fund in contention; the judiciary should be most reluctant to change a settled rule of property so as to frustrate the reasonable expectations of those who make business

decisions based on such rule.

It was clear beyond any reasonable doubt that the debtor, despite the filing of the bankruptcy petition, could have conveyed to a BFP free of any interest arising from the Briggs' deed of trust. For a definition of "bona fide purchaser," as the phrase is used in 11 U.S.C. § 544(a)(3), see In Re Gurs, 27 B.R. 163,165 (9th Cir. BAP 1983). 11 U.S.C. § 549(c) plainly states that the bankruptcy filing is not such constructive notice to the world as to prevent the debtor from conveying clear title to a BFP. If the trustee receives, as § 544(a)(3) says he shall receive, as good a title as the debtor could have conveyed to an ideal BFP, the Ninth Circuit's holding that the trustee's title is subordinate to the Briggs' deed of trust is at least directly contrary to the plain words of 11 U.S.C. § 544 (a)(3).

The Ninth Circuit relies on **inquiry notice.** The leading case on inquiry notice as it relates to the bankruptcy trustee's BFP rights, is In Re Ryan, 851 F. 2d 502, 505 & 511 (1st Cir. 1988). In Re Ryan holds that only if the inquiry notice is derived from constructive notice to the world will such notice affect the trustee's title. In this case, just as in In Re Ryan, there was no constructive notice to the world to trigger any inquiry notice which would have prevented the debtor from conveying to an ideal BFP free of the security interest. If an ideal BFP could have received free of the security interest so must the trustee have received such a title per 11 U.S.C. § 544(a)(3), and In Re Ryan so holds.

The Ninth Circuit's discussion of whether inquiry notice is a species of actual notice or constructive notice is wholly irrelevant; neither type of

notice was here ever present so as to give to the Briggs' deed of trust priority over the trustee's title; i.e., there was no timely constructive notice to the world of the deed of trust. 11 U.S.C. § 549(c)'s notice provision was amended in 1984 so as to leave no doubt that bankruptcy court filings do not provide constructive notice even regarding realty located in the same county as the bankruptcy court. In Re Duffy-Irvine Associates, 39 B.R. 525, 530 (Bkrtcy. E.D. Pa. 1984).

There is no basis upon which to hold that the world was given constructive notice of the bankruptcy court filing here so as to trigger inquiry notice to those who would otherwise qualify as ideal BFPs; therefore such filing cannot, according to law, serve to afford priority to the deed of trust over the trustee's BFP rights under 11 U.S.C. § 544(a)(3).

RCW 4.28.325 provides that the only way to give constructive notice to the world of actions in the U.S. District Court, which includes the bankruptcy court per In Re Goldblatt Bros., Inc., 61 B.R. 459, 466 n. 4 (Bkrptcy. N.D. Ill. 1986), is to file a **lis pendens** with the county where the realty to be affected is situated; the Ninth Circuit's opinion, at A25, that RCW 4.28.325 "does not suggest that this(a lis pendens) is the exclusive method of providing constructive or inquiry notice(of bankruptcy court actions)"(Parentheticals added.), is perhaps literally correct; RCW 4.28.235 does not "suggest" such, it clearly declares such. The Ninth Circuit's logic is flawed in accepting, A25-26, as logical the contention that the Briggs could not have used a lis pendens to give constructive notice. In Re Seaway Exp. Corp., supra pp. 1128-1129. Again,

notice of any type to the bankruptcy trustee per se is wholly inapposite; regardless of what notice he may receive he still takes as good a title as the debtor could have conveyed to any ideal BFP, not merely what the debtor owned under local law. In Re Graham, 110 B.R. 408, 411 & 413 (S.D. Ind. 1990).

Washington statutory and caselaw fully support the result reached below by the bankruptcy court. But even if Washington caselaw held, by flying in the face of "applicable" state statutes, that bankruptcy court filings serve as constructive notice to the world, such state law would be **preempted** by 11 U.S.C. §§ 544(a)(3) & 549(c) where the plain purpose of said federal bankruptcy statutes is, inter alia, to have the bankruptcy trustee take the debtor's property free of unrecorded security interests on bankruptcy estate realty. International Shoe Co. v. Pinkus, 278

U.S. 261,265, 73 L. Ed. 318,320-321, 49 S. Ct. 108,110(1929).

McCannon v. Marston, 679 F. 2d 13 (3rd Cir. 1982), heavily relied on by the Ninth Circuit below, recognized that if the bankruptcy debtor could have conveyed title, at the time the bankruptcy petition was filed, to a BFP free of a given interest in estate realty, then the bankruptcy trustee received such a clear title by the filing of that petition. McCannon held that because the claimant to the realty gave constructive notice to the world of her claim by open and continuous possession a BFP could not have taken free of her claim, and therefore neither did the bankruptcy trustee; the reasoning of McCannon fully supports the result reached by the bankruptcy court below, and is in conflict with the decison of the Ninth Circuit below; here the debtor, per McCannon, could

have conveyed clear title to a BFP despite the filing of the petition.

The opinion of the Ninth Circuit would be obviously untenable if it simply held that a bankruptcy court filing of a bankruptcy petition provides constructive notice to the world of recitals in that petition; instead of so holding, it holds that such a filing places the bankruptcy trustee on inquiry notice, and that such limited notice is sufficient to subordinate the estate's title. That holding is no less untenable, but its invalidity is less obvious. Again, notice to the trustee is irrelevant under 11 U.S.C. § 544(a), and any inquiry notice to an ideal BFP must be triggered by, and be the product of, constructive notice to the world of something. In Re Ryan, supra. If the opinion of the Ninth Circuit stands it will at least be a hazard to legal research nationwide, and will, at least

in the Ninth Circuit states, subvert purpose of 11 U.S.C. § 544(a) in thousands of bankruptcy cases.

The opinion below, at A20, states: "There is no practical reason why a trustee should not be on inquiry notice by the very petition that created his position. A trustee who had not yet been appointed can hardly argue that he has been prejudiced by being charged with notice by the petition." These two sentences reveal that some basic bankruptcy law tenets were overlooked. Congress has clearly found good reason for granting to the trustee BFP rights, and although those reasons have many times eluded judges, the judicial branch should not usurp the legislative province. Some reported opinions have expressed the sound **policy** reasons for granting to bankruptcy estates BFP rights and lien avoidance powers: E.g., In Re Grest Western Plains Ranch Co.,

Inc., 38 B.R. 899,903-905 (Bkrtcy. C.D. Cal. 1984), and In Re Loretto Winery Ltd., 898 F. 2d 715,725-727 (9th Cir. 1990).

The fact that the trustee in his own right would not be prejudiced by being charged with notice, so as to defeat "his" BFP rights, is wholly irrelevant; those rights are intended to benefit the creditors he represents as their alter ego. Further, the fact that neither he, nor the creditors he represents, are prejudiced by reason of no timely constructive notice to the world having been given is of no legal significance. In Re Persig Farms, Inc., 46 B.R. 237,243 (D.C. Minn. 1985). The sentences quoted on the foregoing page indicate the Ninth Circuit's failure to appreciate the fact that the trustee is granted ideal creditor and ideal BFP rights, rather than merely stepping into the debtor's shoes. Said quote also

indicates a lack of appreciation that the trustee's title vests in him as of the time the petition is filed, and his title is deemed fully perfected as of that time. In Re Pacific Exp., Inc., 780 F. 2d 1482,1486 (9th Cir. 1986). Even if "the filing put the trustee, once appointed, on inquiry notice." (A20)(Emphasis added.), such notice would long follow the perfection of the trustee's title, and be plainly untimely to give the security interest priority over the estate's title.

There is nothing peculiar to **Washington law** that renders it incompatible with 11 U.S.C. § 544(a)'s purpose of affording to the bankruptcy trustee ideal lien creditor and BFP rights; in fact RCW 4.28.325/RCW 65.08.070 harmonize and dovetail nicely with 11 U.S.C. §§ 544(a) & 549(c). The trustee had no duty to inquire about an unperfected security interest on estate

property because such interest was disclosed in the bankruptcy petition; such disclosure would, according to law, not diminish or otherwise affect the estate's rights; if, however, the Ninth Circuit's opinion below stands, recitals in bankruptcy filings, which allude to unperfected security interests, will radically alter present priorities regarding estate property; in fact the initial filing in most bankruptcy cases discloses security interests on estate property, be those interests perfected or unperfected.

QUESTION PRESENTED No. 3

Neither the district court nor the Ninth Circuit even attempted to explain how any notice from the bankruptcy petition could be imparted even to the trustee prior to the perfection of his title "as of the commencement of the case." An eloquent and persuasive statement that such simultaneous "notice"

to, and vesting of title in, the trustee, is no notice at all, is found in Matter of Youngs Cornell Utilities, Inc., supra, at page 382; see also In Re Pacific Exp., Inc., supra. The basis of the trial court's decision was untimeliness of the "notice" of the deed of trust in relation to the perfection of the estate's title; this Court should address that sound grounds relied on by the bankruptcy court, the trial court.

QUESTION PRESENTED No. 4

Even if the "notice" of the deed of trust, which was contained in the bankruptcy petition, had been recorded early on where deeds are recorded to give constructive notice to the world, still such recordation would not have given constructive notice of the Briggs' deed of trust. **The recital** in the bankruptcy petition relied on for notice, "supposedly secured by assignments of Deeds of Trust" (Emphasis

added.), not only fails to provide the description of the realty required by RCW 4.28.325, it informs any reader of the petition that the deed of trust alluded to therein is not against bankruptcy estate realty; the debtor would only assign deeds of trust as to which it is the beneficiary, the mortgagee; not regarding which it is the fee owner. The said recital plainly informs a reader thereof that the debtor is not the equity owner of the realty. It is not even a vague hint of a security interest against bankruptcy estate realty, and so would have been wholly inefective to put the world on constructive notice of a deed of trust on realty belonging to the debtor, even if the recital was recorded where the law provides that deeds of trust need to be recorded. Congregational Church Bldg. Soc'y v. Scandinavian Free Church of Tacoma, 24 Wash. 433, 435, 64 P. 750,

750-751 (1901), and In Re Chenich, 100 B.R. 512, 514-515 (9th Cir. BAP 1987). The Ninth Circuit did not even address the meaning of the recital relied on by the Briggs. That recital's identification of the grantor of the deed of trust as other than the bankrupt provides yet another sound basis upon which to sustain the bankruptcy court.

QUESTION PRESENTED No. 5

The Ninth Circuit holds at A11 that it will review the "findings" below on the basis of a clearly erroneous **standard of review**; then goes on at A14-A15, and at A23, to base its decision on various "findings of fact"; that incorrect standard of review, instead of the correct de novo standard, affords undue deference to certain "findings" signed by the bankruptcy judge, but which were presented to him by respondents. A47. A clearly erroneous standard of review is palpably improper

where, as here, the trial court decision was a summary judgment. In Re Kirkland, 915 F. 2d 1236,1238 (9th Cir. 1990): Not only should a summary judgment be reviewed de novo, but so should a determination of state law. Salve Regina College v. Russell, 499 U.S.____, 113 L. Ed. 2d 190,198, 111 S. Ct. 1217,1221(1991). Conclusions of law are reviewed de novo even though the trial court labels them "Findings of Fact". In Re Bubble Up Delaware, Inc., 684 F. 2d 1259,1262 (9th Cir. 1982). Even actual findings of fact, when made in summary judgment proceedings, are reviewed de novo. In Re United Energy Corp., 102 B.R. 757,760 (9th Cir. BAP 1989); and such findings should be scrutinized when drafted, as here, by the party relying on them on appeal. In Re T.H. Richards Processing Co., 910 F. 2d 639, n. 2 at p. 643 (9th Cir. 1990). A bankruptcy trustee's lien avoidance

power is a question of law, and as such is reviewed de novo. In Re Loretto Winery, supra at 718. In sum bankruptcy courts' summary judgments are reviewed de novo in toto. In Re Nash, 765 F. 2d 1410,1412 (9th Cir. 1985). Although the Ninth Circuit's use of an incorrect standard of review would not in itself support a grant of certiorari, it points out how far the Ninth Circuit reached for support for its conclusions regarding certworthy questions one and two.

QUESTION PRESENTED No. 6

If the filing of the bankruptcy petition served to perfect, i.e., transfer, a security interest, such perfection of that interest would be avoidable as a **preferential transfer** under 11 U.S.C. § 547(b). In Re Gulino, supra at 551-552; In Re Chenich, supra at 513 & 515; In Re Meritt, 7 B.R. 876,878 (Bkrtcy. W.D. Mo. 1980); and

U.S. Fidelity & Guaranty Co. v. Ryan, 124 Wash. 329,341-345, 214 P. 433,437-438 (1928). Therefore, even if this Court sustains the holding that the vague hint, at best, in the petition perfected the deed of trust prior to the perfection of the bankruptcy estate's title, this Court should, in its next breath, affirm the bankruptcy court, the trial court, on the basis of voidable preference. Helvering v. Gowran, 302 U.S. 238,245, 82 L. Ed. 224,230, 58 S. Ct. 154,157(1937); and In Re Gulino, supra at p. 552. All the elements of a preference, if perfection is found here, are contained in the record; e.g., the Briggs loaned money to the debtor in October of 1985, and "perfected," i.e., received a transfer of, the security interest in May of 1986 when the bankruptcy petition was filed. The Briggs below took the untenable position that because they did not perfect their

deed of trust by recording it, it has priority over the trustee's title; i.e., giving notice via the petition preserved their security interest, but recording it, at the time the petition was filed, would have destroyed it. The Ninth Circuit did not even address the preference grounds, upon which grounds the bankruptcy court should be sustained, if we accept the inquiry-notice-to-trustee theory relied on by the Ninth Circuit.

PETITIONER'S STANDING TO RELY ON §544(a)

Your petitioner, before concluding, will comment on his standing, as purchaser from the bankruptcy estate, to rely on 11 U.S.C. § 544(a). The respondents in their brief to the Court of Appeals asserted that Miller could not rely on said provision. Miller's reply so refuted that challenge to his standing that respondents conceded the point in oral argument before the Ninth

Circuit.

In Re Seaway Exp. Corp., supra at 1128, makes clear that 11 U.S.C. § 544(a) grants both rights and powers to the trustee, and while the powers might arguably be exercisable only by the trustee, he can certainly assign his BFP rights under the statute. Accord Belisle v. Plunkett, 877 F. 2d 512, 515-16 (7th Cir. 1989). Further, the trustee had already exercised his powers, and obtained a judgment in his favor from the bankruptcy court, before the estate transferred its interest to Miller. Finally, the leading case of In Re Dennis Mitchell Industries, Inc., 419 F. 2d 349,359-360 (3rd Cir. 1969) squarely upholds Miller's right to rely on 11 U.S.C. § 544(a).

CONCLUSION

If this Court denies this petition the decision of the Ninth Circuit will change the law by affording to

unperfected security interests priority over bankruptcy estate titles; if this Court does not grant certiorari 11 U.S.C. § 544(a) will remain judicially eviscerated.

There is nothing unique about the law of the State of Washington, nor the facts of this case, that will restrict the shocking impact the opinion below will have on bankruptcy estate administration. The said opinion is so out of line with other reported opinions, and the plain words governing statutes, it will not only radically change the law in the Ninth Circuit, but outside the Ninth Circuit it will at least wreak havoc as a hazard to legal research.

A bankruptcy trustee acts as the representative of the bankrupt's creditors, and the purpose of bankruptcy law is to effect a ratable distribution of the debtor's assets among those

creditors. The opinion of the Ninth Circuit defeats that purpose by at least exalting form over substance; i.e., notice by recording where security interests should be recorded on the day the petition is filed destroys the security interest, but making reference thereto in a bankruptcy court filing preserves the security interest.

The rules fixing creditors' rights regarding bankruptcy estates are applied nationally, and there is an overriding need, in their application, for national uniformity. Questions presented one and two should be resolved by this Court.

Respectfully submitted,

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(2)

No. 91-1847

Supreme Court, U.S.
FILED
MAY 18 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

MAYNARD B. MILLER,
Petitioner,

vs.

ROBERT BRIGGS and GRACE BRIGGS,
Respondents.

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI
TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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APPENDIX

No. 90-35175

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: Professional Investment Properties of America, Debtor.

ORDER

(EOD April 27, 1992)

Before: WRIGHT, THOMPSON and T.G. NELSON, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 90-35175

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: Professional Investment Properties of America, Debtor.

ROBERT BRIGGS and GRACE BRIGGS, Plaintiffs-Appellees,

v.

ROY W. KENT, Trustee, Estate of Professional Investment Properties of America, Inc., Defendant-Appellant.

OPINION

(EOD January 30, 1992)

Before: Eugene A. Wright, David R. Thompson and Thomas G. Nelson, Circuit Judges.

T.G. NELSON, Circuit Judge:

In this bankruptcy case, we are asked to decide under Washington law whether the contents of the Briggs' involuntary petition which forced the debtor into bankruptcy put the trustee on sufficient inquiry notice of the

Briggs' interest under unrecorded instruments. If so, he may not invoke the avoidance powers provided by 11 U.S.C. § 544. We affirm the district court and hold that the trustee had sufficient notice which precludes the avoidance powers.

FACTS AND PROCEEDINGS BELOW

In October, 1985, the Briggs lent $50,000 to the debtor, Professional Investment Properties. They received a promissory note and a deed of trust on the debtor's real property as security for the loan. The deed of trust was not recorded.

When the Briggs learned of the debtor's financial difficulties, they filed a petition to force the debtor into involuntary bankruptcy on May 28, 1986. Simultaneously, they filed a Motion for Appointment of Trustee, and the real property became an asset of the bankruptcy estate pursuant to 11 U.S.C.

§ 541. In anticipation of a sale of the real property by the trustee, the Briggs attempted to impose an equitable lien on the proceeds. The bankruptcy court denied their motion for summary judgment and held that the Briggs were unsecured creditors of the estate.

The Briggs appealed to the district court which remanded for further findings of fact. Specifically, the district court questioned whether the trustee had constructive notice of the Briggs' interest in the real property. On remand, the Briggs presented expert testimony "that the contents of the petition constituted constructive notice of the Briggs' interest in the real property." Nevertheless, the bankruptcy court granted summary judgment in favor of the trustee concluding that "any constructive notice of plaintiffs' interest achieved by filing the original bankruptcy pleadings comes too late to

secure their interest in a position prior to that acquired by the trustee."

The district court reversed, reaching the opposite conclusion: "It is the judgment of the court that the quoted language constituted constructive notice of a prior claim by the Briggs."

On March 3, 1990, the trustee appealed the decision of the district court. On August 3, 1990, however, the bankruptcy court approved the trustee's sale of the estate's claim to the proceeds from the sale of the property to Maynard B. Miller.

I. Transferability of the trustee's "strong arm powers."

Initially, we must decide whether the trustee's strong arm powers are transferable to Miller. The Briggs claim only the trustee may invoke § 544, discussed hereafter.

First, Miller argues that this court should not discuss the issue because it

was not first raised in the district court. Generally, an appellate court will not consider arguments not first raised before the district court unless there were exceptional circumstances. Villar v. Crowley Maritime Corp., 782 F. 2d 1478, 1483 (9th Cir. 1986). The specific "exceptional circumstances" that this circuit has identified are as follows: (1) review is necessary to prevent a miscarriage of justice; (2) a new issue arises while an appeal is pending because of a change in the law and (3) the "issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." Bolker v. C.I.R., 760 F. 2d 1039, 1042 (9th Cir. 1985).

The third exception applies here. The record has been fully developed and the parties do not dispute that the transfer took place, only the attendant

legal ramifications. It would serve no purpose to remand this case back to the district court to hear an issue that can be addressed equally as well here. Moreover, the explanation for not arguing the issue before the district court is obvious: it was an issue that did not yet exist.

The Briggs argue specifically that Miller cannot assert the strong arm powers of the trustee. In Grass v. Osborn, 39 F. 2d 461 (9th Cir. 1930), this court held under the old Bankruptcy Act that the trustee's avoidance powers could not be transferred. While the Ninth Circuit has not had occasion to comment on the case since it was decided, the Tenth Circuit has done so recently. In In re Sweetwater, 884 F. 2d 1323, 1327 (10th Cir. 1989), the Court noted Grass among other cases and determined that it had been superseded by the enactment of the 1978 Bankruptcy Code.

Sweetwater dealt specifically with 11 U.S.C. 1123(b)(3)(B) pertaining to settlement and enforcement of a bankruptcy plan "by the debtor, by the trustee, or by a representative appointed for that purpose." It explained that a creditor was not allowed to assert the trustee's strong arm powers when done solely for the benefit of that single creditor. For example, the creditor in Texas General Petroleum Corp. v. Evans (In re Texas General Petroleum Corp.), 58 B.R. 357 (Bankr. S.D. Tex. 1986) was denied the power because he was not acting to benefit the plan as a whole and all similarly situated creditors.

We agree with the analysis of the Tenth Circuit. Grass has been superseded by statute and is no longer current law. If a creditor is pursuing interests common to all creditors or is appointed for the purpose of enforcement of the

plan, he may exercise the trustee's avoidance powers.

Here, the trustee sold the estate's claim to the proceeds from the sale of the property with the tacit approval of the bankruptcy court. The court ordered the estate's interest in the appeal terminated and that all responsibility for the claim rested with Miller. While Miller may be acting on his own, he does so with the apparent blessing of the bankruptcy court and the trustee. Clearly, it was in the estate's interests to resolve its involvement in the dispute. In fact, while it was not argued by Miller, nor was he specifically identified for this purpose, he could best be identified as a representative appointed to enforce the debt in line with section 1123(b)(3)(B).

More importantly, the trustee originally asserted the avoidance powers in the bankruptcy and district courts. To refuse Miller the opportunity to

stand in the trustee's shoes would frustrate the obvious wish of the bankruptcy court to end its participation in the matter. In Texas General Petroleum, there was no such involvement by the trustee or the bankruptcy court. The creditor was acting independently and for his sole benefit. For these reasons, we hold that Miller may assert the powers of the trustee.

II. Constructive or Inquiry Notice.[1]

Standard of Review

Generally, the bankruptcy court's findings of fact are reviewed under the clearly erroneous standard and its conclusions of law are reviewed de novo. Ragsdale v. Haller, 780 F. 2d 794, 795 (9th Cir. 1986). Whether a purchaser has inquiry notice is largely a factual determination. In fact, while the district court applied a de novo

[1]For purposes of clarity, Miller and the trustee will hereinafter be referred to as one.

standard of review, In re Probasco, 839 F. 2d 1352,1355 (9th Cir. 1988), indicates that with a question of fact such as we have here, a clearly erroneous standard should apply. "We must accept the bankruptcy court's finding that there was no constructive notice unless we are 'left with a definite and firm conviction that a mistake has been committed.'" (quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). In Probasco, the Court noted that the facts did not appear to be in dispute but it applied the clearly erroneous standard anyway because of "judicial economy." We will do likewise.

Finally, the bankruptcy court's conclusions of law are reviewed de novo by the district court and we, in turn, review the district court's decision de novo. "Because this court is in as good a position as the district court to

review the findings of the bankruptcy court, it independently reviews the bankruptcy court's decision." Ragsdale, at 795 (9th Cir. 1986).

Analysis

The bankruptcy trustee holds "strong arm powers" provided by 11 U.S.C. § 544(a)(3) which states the trustee is to be considered:

> A bona fide purchaser of all real property ... from the debtor, against whom applicable law permits such transfer to be perfected, that attains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C. § 544(a)(3).

[1] State law determines whether a party is a bona fide purchaser. In re Washburn and Roberts, Inc., 795 F. 2d 870, 872 (9th Cir. 1986). In Washington, a bona fide purchaser is

defined as "one who without notice of another's claim of right to, or equity in, the property prior to his acquisition of title, has paid the vendor valuable consideration." Miebach v. Colasurdo, 102 Wash. 2d 170, 175, 685 P. 2d 1074, 1078 (1984). Washington, which is a race-notice state, generally holds that a bona fide purchaser prevails over a prior transferee who has failed to record. RCW 65.08.070; Paganelli v. Swendsen, 50 Wash. 2d 304, 308, 311 P. 2d 6676, 678 (1957). Since the strong arm powers elevate the trustee to a level of a bona fide purchaser, a trustee without notice can generally avoid any unrecorded transfer of land in the State of Washington. Washburn at 872.

The Briggs admit that their deed of trust was unrecorded. This case turns on whether the petition itself put the trustee on sufficient inquiry or constructive notice of their prior

security interest. Miebach stated:

> It is a well-settled rule that where a purchaser has knowledge of information of facts which are sufficient to put an ordinarily prudent man upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the discovery of defects in the title or of equitable rights of others effecting the property in question, the purchaser will be held chargeable with knowledge thereof and will not be heard to say that he did not actually know of them. In other words, knowledge of facts sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed.

Miebach at 175-6, 685 P. 2d at 1078 (quoting Peterson v. Weist, 48 Wash. 339, 341, 93 P. 519,519 (1908).

The bankruptcy court found factually that a diligent title search would disclose a bankruptcy filing. Secondly, it found that "a reasonably prudent

purchaser of the debtor's property would be placed on notice of the contents of bankruptcy pleadings from the time of their being filed." It determined, as a matter of law, however, that "any constructive notice of plaintiffs' interest achieved by filing the original bankruptcy pleadings comes too late to secure their interest in a position prior to that acquired by the trustee."

It is the Briggs' contention, obviously, that the bankruptcy court was wrong; that the debtor's involuntary petition contained facts sufficient to put the trustee on at least inquiry notice that they had a prior claim. Secondly, they assert that notice simultaneous with filing is sufficient.[2]

[2] A trustee does not become a

[2]The trustee's actual notice is of no consequence. Section 544(a) states that the trustee shall have the rights and powers of a bona fide purchaser "without regard to actual knowledge." Probasco and In re Marino, 813 F. 2d

hypothetical bona fide purchaser if she has been put on constructive or inquiry notice. In re Marino, 813 F. 2d 1562, 1565 (9th Cir. 1987). McCannon v. Marston, 679 F. 2d 13, 16 (3rd Cir. 1982) clarified the distinction by noting, "[t]he reference to the trustee's or creditors' knowledge appears to have originated out of a concern that actual knowledge might affect the trustee's status as a hypothetical lien creditor." Id. at 16. McCannon pointed out, however, that "Congress was careful to modify the status of bona fide purchasers by inserting the words 'against whom applicable law permits such transfer to be perfected.'" Id. at 17.

The trustee argues that inquiry notice is insufficient because it is species of actual notice which is

2 (continued.)
1562, 1565 (9th Cir. 1987) have consequently held that "actual knowledge is irrelevant." See McCannon v. Marston, 679 F. 2d 13, 16-17 (3rd Cir. 1982).

irrelevant in this context. See McCannon note 2. He cites Sands v. United States, 198 F. Supp. 880,884 (W.D. Wash. 1960) aff'd, First Federal Sav. & Loan Ass'n of Bremerton v. United States, 325 F. 2d 481 (9th Cir. 1961), which states "actual notice may also consist of implied or inquiry notice."

This explanation directly conflicts wit Marino which clearly mandated that a trustee may still be held accountable if put on inquiry notice. Marino controls, not simply because it is more recent, but because it discusses the relationship of section 544(a)(3) with state property law. Moreover, decisions such as Probasco discuss the trustee's notice requirement in terms of a constructive notice that encompasses inquiry notice. "A prudent purchaser inquiring as to the unity of ownership of all three parcels 'might have learned' of Probasco's interest in [the property]." Id. at 1356.

See also In re Tleel, 876 F. 2d 769, 772 (9th Cir. 1989) (discussing the failure in that case to provide constructive or inquiry notice.)

The trustee argues that even if inquiry notice could preclude him from invoking the avoidance powers, the information in the Briggs' petition was insufficient to provide such notice. He contends further that any information or notice which he attained after that period did not bear on his status as a bona fide purchaser at the time of filing of the case.[3]

The Briggs' Involuntary Creditors' Petition makes one reference to deeds of trust:

[3] This is true. In re Gurs, 27 B.R. 163 (9th Cir. BAP 1983) defined a § 544(a)(3) hypothetical bona fide purchaser as one who is without actual knowledge "at the instant the petition is filed," and purchases property from the debtor for value and in good faith. Consequently, we will only discuss the ramifications of the petition itself.

> 2. The nature and amount of Petitioners' claims are as follows:
>
> (a) ROBERT BRIGGS: Purchase of various Promissory Notes supposedly secured by assignments of Deeds of Trust with interest-only monthly payments which are now delinquent, some with said Notes have matured and are unpaid, in the aggregate amount of approximately $137,500.

E.R. at 17.

While the bankruptcy court held that this petition came too late to secure the Briggs' position ahead of the trustee's, the district court determined under Washington law:

> this language is sufficient to put an ordinarily prudent person on inquiry of the Briggs' interest in the real property in the form of Deed of Trust. Certainly, the language creates a circumstance which raises a duty to require further inquiry by the trustee to determine if there is a Deed of Trust. A reasonably diligent inquiry

> would have disclosed the unrecorded deeds of trust.

E.R. at 17-18.

While the bankruptcy court determined as a matter of law that inquiry notice that is simultaneous with filing "comes too late," the district court held that the filing would put the trustee, once appointed, on inquiry notice.

[3] We are persuaded by the district court's holding. There is no practical reason why a trustee should not be put on inquiry notice by the very petition what created his position. A trustee who has not yet been appointed can hardly argue that he had been prejudiced by being charged with notice by the petition. Secondly, there is an abundance of authority making clear that state law determines a bona fide purchaser's status.[4] If the petition

[4] See In re Washburn and Roberts, 795 F. 2d at

satisfies Washington law, the trustee has been put on inquiry notice.

"The burden of establishing that a purchaser had prior notice of another's claim, right, or equity, rests upon the one who asserts such prior notice." Glaser v. Holdorf, 56 Wash. 2d 204, 209, 352 P. 2d 212, 215 (1960) (citations omitted). In Miebach, the court noted that because the plaintiff was an experienced businessman and the debtors still had possession of the property, making continuous improvements on it, the plainitff was on at least inquiry notice of their claim to the property. Id. at 1077-78.

In Peterson v. Weist, 48 Wash. 339, 93 P. 519 (1908), the deed delivered to the plaintiff's vendor contained a

4(continued.)
872; In re Tleel, 876 F. 2d at 772; In re Marino, 813 F. 2d at 1565; In re Torrez, 63 B.R. 751, 754 (9th Cir. BAP 1986), aff'd 827 F. 2d 1299 (9th Cir. 1987).

reservation clause which stated:

> Saving and reserving therefrom all the timber of every kind and character now thereon, except cedar, reserving also the right to pass over the premises wherever necessary to remove the timber herein reserved; possession to be given of the timber and roads when A.C. Mowry's time is up upon the timber, viz.: 3 years from Feb. 10, 1902.

Id. at 340, 93 P. at 519.

The appellants in Peterson conceded they were aware of the reservation but did not know of the time allowed for removal. The court had no sympathy: "If they had no notice of the time allowed for removal of the timber it was solely because they made no inquiry. They could not blindly rely on the statement of their vendors and they made no inquiry from any other source." Id. (citations omitted).

[4] This case is similar. The involuntary petition indicated the very people who instigated the bankruptcy proceedings held a deed of trust. This petition should have raised the

trustee's suspicions and compelled him to inquire further. Since this was an involuntary petition, the trustee need only have contacted the Briggs to determine their specific interest. In fact, the trustee had a duty to inquire as to the nature of the Briggs' claim once he was appointed.

The bankruptcy court's findings of fact support this holding even if its conclusions of law do not. The court determined that "a reasonably prudent purchaser of the debtor's property would be placed on notice of the bankruptcy pleadings from the time of their being filed." This statement is consistent with the district court's holding that the petition simultaneously provided notice to the trustee. Consequently, while we adopt the bankruptcy court's findings of fact, we hold that the district court arrived at the correct legal conclusion.

Finally, the trustee argues that pursuant to RCW 4.28.325, the Briggs were required to file a lis pendens with the auditor of the county in which the property was situated.[5]

[5] The filing of a lis pendens in connection with a lawsuit against the record title holder of real property gives constructive notice of an action to subsequent purchasers from the record title holder. In re Gurs, 27

[5] 4.28.325 reads in relevant part:

In an action in a United States district court for any district in the State of Washington affecting the title to real property in the State of Washington, the plaintiff, at the time of filing the complaint ... may file with the auditor of each county in which the property is situated a notice of a pendency of the action .... From the time of the filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby ...

(Emphasis added.)

B.R. 163, 165 (1983) (citing similar California law). The trustee, however, suggests that this is a requirement before he can receive constructive notice. We disagree. Although the statute indicates that filing a lis pendens provides constructive notice to the world, it does not suggest that this is the exclusive method of providing constructive or inquiry notice. Miebach indicates that the proper focus is on whether the purchaser has any knowledge or information or facts which would put an ordinarily prudent man upon inquiry. Id. at 1078. The Briggs argue that any lis pendens filed by the Briggs prior to the filing of their involuntary creditor's petition would have been invalid. There was no pending action at that time and an action must be in fact pending for a lis pendens to be valid. Dunham v. Tabb, 27 Wash. App. 862, 866, 621 P. 2d 179, 181 (1980). Their

argument has logic but we find determinative the fact that the lis pendens was not the only method by which constructive notice could be established. Once the trustee was appointed, he had a duty to investigate the Briggs' deed of trust.

AFFIRMED.

No. 90-35175

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: PROFESSIONAL INVESTMENT PROPERTIES OF AMERICA, Debtor.	)
ROBERT BRIGGS and GRACE BRIGGS, Plaintiffs-Appellees,	) ORDER
v.	)
ROY W. KENT, Trustee, Estate of Professional Investment Properties of America, Inc., Defendant-Appellant.	)

(EOD March 4, 1992)

Before: WRIGHT, THOMPSON and T.G. NELSON, Circuit Judges.

Appellant Maynard Miller's "Motion for Substitution" and "Motion in Alternative to Extend Time to Suggest [Rehearing En Banc] & Petition [for Rehearing]" is GRANTED. Miller will have 14 days from the date of entry of this order within which to file a petition for rehearing and suggestion for rehearing en banc.

UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DIST. OF WASHINGTON AT TACOMA

IN RE:

PROFESSIONAL INVESTMENT PROPERTIES OF AMERICA, INC., A Washington corporation d/b/a PROFESSIONAL INVESTMENT PROGRAMS OF AMERICA, Debtor.	)NO.86-32060T)ORDER ON)HEARING ON)TRUSTEE'S)INTENTION TO)SELL PROPERTY FREE AND CLEAR OF LIENS

(EOD August 6, 1990)

THIS MATTER coming before the court upon the Notice of Hearing on Trustee's Intention to Sell Property Free and Clear of Liens filed by the Trustee, Roy W. Kent, the court finding the bid of $10,000.00 for the bankruptcy estate's interest in a claim for funds received from the sale of the Buckley property which claim is subject to an Adversary Proceeding, Case No. 87-32277 and presently is under Appeal to the Ninth Circuit Court of Appeals was the highest and best bid for this asset, and the court deeming itself fully advised, Now, Therefore, it is hereby

ORDERED that the bid of $10,000.00 by MAYNARD B. MILLER for the bankruptcy estate's interest in the claim for funds received from the sale of he Buckley property and the pending Adversary Proceeding is hereby accepted upon payment by the purchaser within ten days of this Order. It is further

ORDERED that the estate's interest in the Appeal to the Ninth Circuit Court of Appeals shall terminate and the bankruptcy estate shall remain a party to the Appeal in name only. The Trustee will no longer retain an attorney to proceed with the Appeal, and all responsibility for the Appeal and pursuit of the claim will be the responsibility of Maynard B. Miller. It is further

ORDERED that this sale is without representation or warranties and is without recourse against the Trustee, either individually or as such Trustee. It is further

ORDERED that the sale will be free and clear of liens and encumbrances.

DONE IN OPEN COURT this 3 day of August, 1990.

/s/ Robert W. Skidmore
ROBERT W. SKIDMORE
BANKRUPTCY JUDGE

PRESENTED BY:

/s/ Roy W. Kent
ROY W. KENT, WSBA 8640
Attorney for Trustee

Copy received;
approved for entry:

/s/Shawn B. Briggs
SHAWN B. BRIGGS
Attorney for Creditor Briggs

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

In re PROFESSIONAL INVESTMENT PROPERTIES OF AMERICA, Debtor. _____ ROBERT and GRACE BRIGGS, Plaintiffs-Appellants, v. ROY W. KENT, Trustee, and the Estate of PROFESSIONAL INVESTMENT PROPERTIES OF AMERICA, Defendant/Appellee.	CIVIL NO. C89-340TB ORDER REVERSING ORDER OF BANKRUPTCY COURT; and ORDER OF REMAND EOD Feb. 23, 1990

THIS MATTER comes before the court on the appeal of plaintiffs, Robert and Grace Briggs, from the Order on Summary Judgment entered on May 30, 1989 by U.S. Bankruptcy Judge Robert W. Skidmore. In that order, plaintiffs' Motion for Summary Judgment was denied and defendant Roy Kent, Trustee's Motion for Summary

Judgment was granted. The court has reviewed the pleadings filed in support of and in opposition to this appeal, and the records and files herein, and rules as follows:

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction of this matter pursuant to 28 U.S.C. § 155(a).

> Findings of fact, whether based oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of the witnesses.

Bankruptcy Rule 8013. Conclusions of law by the bankruptcy court are reviewed by this court, de novo. In Re Probasco, 839 F. 2d 1352, 1353-54 (9th Cir. 1988) (citations omitted).

FACTUAL/PROCEDURAL BACKGROUND

In October 1985, plaintiffs, Robert and Grace Briggs, lent $50,000 to the debtor, Professional Investment

Properties of America. As security for the loan, the plaintiffs received a promissory note and Deed of Trust on the debtor's real property, described in Finding of Fact number 2 in the Order on Summary Judgment. The Deed of Trust, however, was not recorded.

When the plaintiffs became aware that the debtor had financial difficulties, they filed a petition for involuntary bankruptcy on behalf of the debtor on May 28, 1986, and, at the same time, filed a Motion for Appointment of Trustee. The real property became an asset of the bankrupt estate at that time pursuant to 11 U.S.C. § 541.

Thereafter, an adversary proceeding was filed by the Briggs to impose an equitable lien on the proceeds of an anticipated sale of the real property by the trustee. The Briggs moved for summary judgment. Following argument of counsel, the bankruptcy court not only

denied Briggs' motion, but held, as a matter of law, that the Briggs were the unsecured creditors of the estate.

The Briggs appealed that ruling to this court and on September 23, 1988, an "Order Affirming in Part and Remanding in Part the Order on Summary Judgment Entered by U.S. Bankruptcy Court" was entered. In that order, this court remanded the case to the Bankruptcy Court for further hearing and findings of fact on whether the trustee had constructive notice of the Briggs' interest in the real property.

On remand, both parties moved for summary judgment. A hearing was held by the Bankruptcy Court. At that hearing, the Briggs presented expert testimony that the contents of the petition constituted constructive notice of the Briggs' interest in the real property. The Bankruptcy Court granted summary judgment in favor of the trustee and

concluded that "any constructive notice of plaintiffs' interest achieved by filing the original bankruptcy pleadings comes too late to secure their interest in a position prior to that acquired by the trustee." (Conclusion of Law No. 2, Order on Summary Judgment, p. 3.) The Briggs are again appealing that order.

ISSUE PRESENTED

The issue presented by this appeal (as stated by the Briggs) is whether a bankruptcy trustee is deemed to have constructive notice of the contents of a petition in bankruptcy. The issue can also be stated as follows: Is the Briggs' security interest in the real property, as represented by the unrecorded deed of trust, superior to the trustee's claim, which is equivalent to that of a bonafide purchaser under Washington State law?

DISCUSSION

The strong arm powers inherent in 11

U.S.C. § 544(a)(3) provides that the trustee in bankruptcy has the same rights as

> (3) a bonafide purchaser of all real property . . . from the debtor, against whom applicable law permits such transfer to be perfected, that attains the status of a bonafide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

State law determines whether a party is a bonafide purchaser and the rights of a bonafide purchaser. In Re Washburn & Roberts, Inc., 759 F. 2d 870, 872 (9th Cir. 1986). Under Washington law, a bonafide purchaser of a value is "one who without notice of another's claim of right to, or equity in, the property prior to his acquisition of title, has paid the vendor a valuable consideration." Miebach v. Colasurdo, 102 Wash. 2d 170, 175 (1984) (citations

omitted). Generally, under Washington law, a bonafide purchaser prevails over a prior transferee who has failed to record. R.C.W. 65.08.070; Paganelli v. Swendsen, 50 Wash. 2d 304, 311 (1957). See also, In Re Washburn, 795 F. 2d 872. Therefore, under 11 U.S.C. § 544 (a)(3), a trustee without notice can generally avoid any unrecorded transfer of land in Washington. In Re Washburn, supra.

The pivotal issue in this appeal is whether the trustee had actual or constructive notice of the Briggs' prior security interest in the real property. Under Washington law, the notice "need not be actual nor amount to full knowledge." Miebach, supra.

> It is a well-settled rule that where a purchaser has knowledge or information of facts which are sufficient to put an ordinarily prudent man upon inquiry, and the inquiry, if followed with reasonable diligence, would lead to the

> discovery of defects in the title or of equitable rights of others affecting the property in question, the purchaser will be held chargeable with knowledge thereof and will not be heard to say that he did not actually know of them. In other words, knowledge of facts sufficient to excite inquiry is constructive notice of all that the inquiry would have disclosed.

Daly v. Rizzutto, 59 Wash. 62, 65 (1910); Paganelli, 50 Wn. 2d at 308; Miebach, 102 Wn. 2d at 175-76.

It is conceded that the Briggs' interest in the real property was unrecorded at the time of the trustee's appointment. The Briggs argue that the petition for involuntary bankruptcy contained enough information to constitute constructive notice of their interest in the real property, even though the deed of trust was not recorded.

In response, the trustee contends

that the determination of the trustee's status as a bonafide purchaser for value, pursuant to 11 U.S.C. § 544(a)(3), is determined as of the time of the commencement of the case. The only information that the trustee was aware of at that point is the information is the petition. The trustee contends that the information in the petition was insufficient to notify him of the Briggs' prior interest in the property. Any information or notice which the trustee attained after that period does not bear on the question of whether or not the trustee is a bonafide purchaser at the time of filing the case. In Re Probasco, 839 F. 2d at 1354-55.

The specfic language in the "Involuntary Creditors Petition" (Ex. 3 to Brief of Appellants) which arguably constitutes constructive notice is:

2. The nature and amount of

Petitioners' claims are . as follows:

> a) ROBERT BRIGGS: Purchase of various Promissory Notes supposedly secured by assignments of Deeds of Trust with interest-only monthly payments which are now delinquent, some of said Notes have matured and are unpaid, in the aggregate amount of approximately $137,500.00.

Whether that language constitutes constructive notice is a question of law. Therefore, de novo review is appropriate. Under Washington law, this language is sufficient to put an ordinarily prudent person on inquiry of the Briggs' interest in the real property in the form of a Deed of Trust. Certainly, the language creates a circumstance which raises a duty to require further inquiry by the trustee to determine if there is a Deed of Trust. A reasonably diligent inquiry

would have disclosed the unrecorded deeds of trust. Since the petition was an involuntary one, the trustee might obtain further information most easily by contacting the petitioners. "What makes inquiry a duty is such a visible state of things as is inconsistent with a perfect right in him who proposes to sell." Bernard v. Benson, 58 Wash. 191, 196 (1910). The trustee had sufficient information to notify him that his right to the property was not a perfect one.

It is the judgment of the court that the quoted language constituted constructive notice of a prior claim by the Briggs. The conclusions of law entered by the Bankruptcy Court are not consistent with the findings of fact. The order of the Bankruptcy Court should be reversed insofar as it incorrectly applies Washington law that the quoted language did not constitute constructive notice to the trustee (Conclusion of Law

No. 1) and that any constructive notice of the Briggs' interest came too late to secure their interest in the real property (Conclusion of Law No. 2). The case should be remanded for further proceedings consistent with this opinion.

Therefore, it is hereby

ORDERED that the Order of Summary Judgment entered by U.S. Bankruptcy Court on May 30, 1989 is hereby **REVERSED** and this case is hereby **REMANDED** to the U.S. Bankruptcy Court for further proceedings consistent with this decision.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record and to the U.S. Bankruptcy Judge Robert W. Skidmore.

DATED this 22 day of February, 1990.

/s/Robert J. Bryan
ROBERT J. BRYAN
United States
District Judge

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT TACOMA

In Re:	)
	)Bankruptcy No.
PROFESSIONAL INVESTMENT PROPERTIES OF AMERICA,	)86-32060TS
Debtor.	)
ROBERT & GRACE BRIGGS,	)Adversary No.)A87-32277
Plaintiffs,	)
vs.	)ORDER ON)SUMMARY
ROY KENT, Trustee, and the ESTATE OF PROFESSIONAL INVESTMENT PROPERTIES OF AMERICA,	)JUDGMENT)(EOD May 31,) 1989)
Defendants.	)

THIS MATTER coming before the Court upon the motion of plaintiffs for summary judgment, the plaintiffs appearing by and through their attorney, SHAWN B. BRIGGS of BRIGGS & BRIGGS, and the defendant trustee appearing through his attorney, ROY W. KENT of KANE, VANDERBERG, HARTINGER & WALKER; and the Court having read and considered the files and records herein and deeming

itself fully advised, now makes the following:

FINDINGS OF FACT

1. In October of 1985, plaintiffs lent $50,000 to the debtor, Professional Investment Properties of America.

2. As security for the loan, the debtor issued to plaintiffs a promissory note and Deed of Trust on the debtor's real property described as:

> Lots 12 through 20, inclusive, Block 1, and Lots 1 through 8, inclusive, Block 2, Clare O'Len Addition to the City of Buckley, Washington, according to Plat recorded in Book 40 of Plats at pages 14 and 15, which is a re-record of Plat recorded in Book 34 of Plats at pages 29 and 30, in Pierce County, Washington.

3. The Deed of Trust was not recorded.

4. On May 28, 1986, plaintiffs filed a petition for involuntary bankruptcy of debtor. Plaintiffs, at the same time, filed a Motion for Appointment of Trustee and Order to Show

Cause.

5. Plaintiffs contend that the original pleadings of May 28, 1986, and the language contained therein, placed reasonably prudent purchasers on inquiry notice of plaintiffs' Deed of Trust interest in the debtor's property.

6. Plaintiffs further maintain that the defendant trustee did not achieve bona fide purchaser status and, therefore, could not avoid plaintiffs' interest because, due to the contents of the original pleadings, he had constructive notice of plaintiffs' interest at the time his rights were affixed.

7. It is undisputed that a diligent title search discloses bankruptcy filings.

8. It is also undisputed that a reasonably prudent purchaser of the debtor's property would be placed on notice of the contents of bankruptcy pleadings from the time of their being filed.

9. On summary judgment plaintiffs offered the affidavit of Louis J. Burkey. In Mr. Burkey's expert opinion, the contents of the original bankruptcy pleadings were sufficient to place a reasonably prudent purchaser on inquiry notice of plaintiffs' Deed of Trust interest.

10. Defendant offered no evidence or affidavit to controvert Mr. Burkey's opinion.

CONCLUSIONS OF LAW

1. Pursuant to 11 USC §544, the trustee has the status of a hypothetical bona fide purchaser, which provides him the power to avoid all interests in the debtor's real property of which he has no constructive notice as of the time the action is commenced.

2. Any constructive notice of plaintiffs' interest achieved by filing the original bankruptcy pleadings comes too late to secure their interest in a

position prior to that acquired by the trustee.

3. Plaintiffs' Deed of Trust interest in the debtor's property is avoidable by the defendant.

4. Plaintiffs' motion for summary judgment should be denied.

5. Defendant's motion for summary judgment should be granted.

ORDER

Plaintiffs' motion for summary judgment is hereby denied and defendant's motion for summary judgment is hereby granted.

Done in open Court this 30th day of May, 1989.

/s/Robert W. Skidmore
ROBERT W. SKIDMORE, J

Presented by:

/s/Shawn B. Briggs
SHAWN B. BRIGGS of
BRIGGS & BRIGGS
Attorneys for Plaintiffs

Approved as to form and notice
of presentment waived by:
/s/Roy W. Kent, Attorney for Defendant

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT TACOMA

In Re:	
PROFESSIONAL INVESTMENT PROPERTIES OF AMERICA,	Bankruptcy #86-32060TS
Debtor.	
ROBERT & GRACE BRIGGS,	Adversary #A87-32277
Plaintiffs,	
vs.	PRETRIAL ORDER
ROY KENT, Trustee, and the ESTATE OF PROFESSIONAL INVESTMENT PROPERTIES OF AMERICA,	(EOD Dec. 12, 1988)
Defendants.	

JURISDICTION

Jurisdiction is vested in this Court by virtue of an adversary claim arising from the involuntary bankruptcy of Professional Investment Properties of America.

AGREED FACTS

The following facts are agreed to by the parties:

1. On October 20, 1985, as security

for a $50,000 promissory note from debtor to the plaintiffs, a Deed of Trust on debtor's real property was issued to plaintiffs by the debtor corporation.

2. The debtor corporation failed to pay the promissory note when it became due and thereby defaulted on the note. Debtor owes plaintiffs $50,000 plus interest on the note.

3. The Deed of Trust in plaintiffs' favor was unrecorded.

4. On May 28, 1986, plaintiffs petitioned the United States Bankruptcy Court for the Western District of Washington for involuntary bankruptcy of the debtor corporation.

FACTS NOT AGREED BUT NOT CONTESTED

Plaintiffs allege the following facts, which the defendant is not prepared to admit but does not contest:

1. A diligent commercial title search discloses bankruptcy filings.

2. A reasonably prudent purchaser of

the debtor corporation's real property would be placed on notice of the contents of bankruptcy pleadings from the time of their being filed.

FACTUAL CONTENTIONS

The plaintiffs contend as follows:

The original bankruptcy pleadings of May 28, 1986 placed reasonably prudent purchasers on inquiry notice of plaintiffs' Deed of Trust interest in the debtor corporation's property.

Defendant contends the contrary.

ISSUE OF LAW

The following is the issue of law to be determined by the Court:

Where the trustee acquired an interest in a debtor corporation's property by virtue of a bankruptcy action in which the original pleadings referred to an unrecorded Deed of Trust in favor of plaintiffs, does the trustee take the property subject to that interest referenced in the original bankruptcy

pleadings of which a reasonably prudent purchaser would be placed on inquiry notice?

EXPERT WITNESS

(a) Each party shall be limited to one expert witness on the issue of notice.

(b) The name and address of the expert witness to be used by plaintiffs at the trial and the issue upon which he will testify is: Louis J. Burkey, 1111 A St., Tacoma, Washington, will testify as to the issue of notice.

(c) Defendant's possible expert witness who may testify as to notice will be a title officer from a local company. Defendant will provide further information upon selection.

OTHER WITNESSES

The names and addresses of witnesses, other than experts, to be used by plaintiffs at the time of trial and the general nature of the testimony of each:

1. Robert R. Briggs, 8007 65th Avenue Court SW, Tacoma, Washington, 98467 (possible witness only).

2. Grace D. Briggs, 8007 65th Avenue Court SW, Tacoma, Washington, 98467 (possible witness only).

EXHIBITS

Plaintiffs exhibits listed below may be received in evidence without objection:

1. Copy of Deed of Trust dated October 20, 1985.

2. Copy of Promissory Note dated October 20, 1985.

3. Copy of Summons and Involuntary Creditors Petition filed May 28, 1986.

4. Copy of Motion for Appointment of Trustee filed May 28, 1986.

5. Copy of Order to Show Cause filed May 28, 1986.

ACTION BY COURT

(a) This case is scheduled for trial without a jury on April 3, 1989.

(b) Trial briefs shall be submitted to the Court on or before March 27, 1989.

(c) The court will allow the parties to file summary judgment motions prior to trial.

(d) Other:

This order has been approved by the parties as evidenced by the signatures of their counsel. Upon entry of this order, the pleadings pass out of the case. This order shall not be amended except by order of the court pursuant to agreement of the parties or to prevent manifest injustice.

Dated this 8th day of December, 1988.

/s/Robert W. Skidmore
ROBERT W. SKIDMORE
Judge, U.S.
BANKRUPTCY COURT

FORM APPROVED:

/s/Shawn B. Briggs
SHAWN B. BRIGGS of
BRIGGS & BRIGGS
Attorneys for plaintiffs

/s/Roy W. Kent
ROY W. KENT of
KANE, VANDEBERG et al. Attys for Def.

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

In re: PROFESSIONAL INVESTMENT PROPERTIES OF AMERICA, Debtor.	District Court # C88-096TB Bankruptcy No. 86-32060T
ROBERT and GRACE BRIGGS, Plaintiffs/ Appellants, v. ROY W. KENT, Trustee, and the ESTATE OF PROFESSIONAL INVESTMENT PROPERTIES OF AMERICA, Defendants/ Appellees.	Adversary No. A87-32277T ORDER AFFIRMING IN PART AND REMANDING IN PART ORDER ON SUMMARY JUDGMENT ENTERED BY U.S. BANKRUPTCY COURT (EOD Sep. 23, 1988)

THIS MATTER comes before the Court on the appeal brought by the plaintiffs/appellants, Robert and Grace Briggs, of the Order on Summary Judgment entered by U.S. Bankruptcy Judge Robert W. Skidmore on February 3, 1988. The Court has considered the briefs filed in support of, and in opposition to the appeal, as well as relevant portions of

the file. Oral argument was held on Thursday, September 22, 1988. An oral decision was given by the Court, which is attached hereto and fully incorporated herein by this reference.

Therefore, for the reason set forth in the Court's oral decision, it is hereby

ORDERED that the Order on Summary Judgment entered by U.S. Bankruptcy Judge Robert W. Skidmore on February 3, 1988 is **AFFIRMED** in part and **REMANDED** in part for further hearing and findings of fact in accord with the Court's oral decision.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record, and to U.S. Bankruptcy Judge Robert W. Skidmore.

Dated this 23rd day of Sept., 1988.

/s/Robert J. Bryan
ROBERT J. BRYAN
United States District Judge

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT TACOMA

In re PROFESSIONAL INVESTMENT PROPERTIES OF AMERICA, Debtor.	))Civil)#C88-096TB)))Bankruptcy #)86-3206T
ROBERT and GRACE BRIGGS, Plaintiffs, v. ROY W. KENT, Trustee, and the ESTATE OF PROFESSIONAL INVESTMENT PROPERTIES OF AMERICA, Defendants.	)Adversary No.)A87-32277T))Tacoma, Wash-)ington)September 22,)1988))(EOD Sept. 23,) 1988)

TRANSCRIPT OF JUDGE'S ORAL DECISION

BEFORE THE HONORABLE ROBERT J. BRYAN

UNITED STATES DISTRICT JUDGE.

APPEARANCES:

For the Plaintiffs: SHAWN B. BRIGGS
BRIGGS & BRIGGS
10222 Gravelly Lake Drive SW
Tacoma, Wash. 98499

For the Defendants: ROY W. KENT
KANE, VANDEBERG et al.
1st Interstate Plaza 2000
Tacoma, Wash. 98402

Court Reporter: Julaine V. Ryen
Post Office Box 1968
Silverdale, Washington 98383-1968

Proceedings recorded by mechanical stenography, transcript produced by Reporter on computer.

* * * * *

THE COURT: Well, I think I will rule on this orally, counsel, and then enter a short order referencing my oral opinion.

First, the bottom line: It appears to me that Judge Skidmore was correct in denying the plaintiffs' motion for Summary Judgment, but it further appears to me that he erred in going the step further and making a finding of fact that the plaintiffs were deemed to be unsecured creditors of the bankrupt estate. His opinion, his Order on Summary Judgment, should be affirmed so far as the motion for summary judgment is concerned, but should be remanded for

further hearing -- factual hearing -- on the issue of whether the plaintiffs are unsecured creditors or whether they are entitled to the establishment of a constructive trust over the subject property. I think they are entitled to their day in court on that.

Really, the question before me is the narrow issue of whether there is a material fact in issue from which a reasonable person could determine that there was constructive notice to the trustee under these circumstances. That would make the Briggs secured rather than unsecured creditors. I think the Briggs have an uphill fight on that issue, but I think they are entitled to their day in court.

There are errors of law, in my judgment, in the order on summary judgment, and I should, I guess, call attention to them specifically.

In paragraph 5, Judge Skidmore

indicated the following: "Under Washington State law, a purchaser for value without actual or constructive notice of a prior interest is given bona fide purchaser status and thus priority over unrecorded interests." That is not in and of itself an incorrect statement of law, but he did not go the one step further to say that a purchaser under Washington State law, a purchaser for value with constructive notice of a prior interest, is not given bona fide purchaser status, and therefore is not given priority over an unrecorded interest.

In paragraph 7, the order states, "Any constructive trust or equitable lien the Plaintiffs may have is inferior to the rights of the Trustee and thus void." Well, we see from the Probasco case that it may be that under some circumstances, a constructive trust would not be inferior to the rights of a trustee.

First, in discussing the law, Section 544, while it makes it clear -- and apparently clear to the Ninth Circuit, as well -- that the actual knowledge of the trustee is not in issue, from the time of filing. (That is the commencement of the case, which is filing, according to the Bankruptcy Code.) The Probasco case in 839 Federal Reporter 2d, at 1352, makes it clear that constructive notice is an issue that must be addressed and that constructive notice, if it exists, can deprive a trustee from status equal to a Washington State bona fide purchaser.

The Probasco case, I believe, referred to a debtor in possession. It is my understanding that the law is that a trustee is in the same status as a debtor in possession. That's a 1988 case that clarifies some earlier cases. One was In Re Washburn, and that's 759 F. 2d at 870. In that case, there's some interesting language as follows: The

Court, Ninth Circuit, said to determine what rights a bona fide purchaser would have, we look to state law. ". . . Under Washington law, a bona fide purchaser prevails over a prior transferee who failed to record. . . . Accordingly, under Section 544(a)(3), a trustee can generally avoid any unrecorded transfer of land in Washington." That is a correct statement of law, but the -- if I can call it a weasel word -- the weasel word "generally" left the door open for the court to do just what they did later in Probasco in saying that under some circumstances constructive notice may apply to a trustee.

In Re Tleel, 79 B.R. 883, which was a bankruptcy appellate panel, 1983 decision, in my judgment really isn't of much help here because it's not a notice case. It had to do with some similar issues, but it really did not key in on the issues in this case surrounding the

notice question.

It is clear from Probasco and other cases that to define a bona fide purchaser and to look for the circumstances surrounding bona fide purchaser, you look to state law, and that is well discussed in the case of Miebach v. Colasurdo, 102 Wn. 2d 170, which was cited by counsel. That case speaks to constructive notice -- I need not go into any details on it -- but does speak to constructive notice as knowledge or information which would put an ordinary prudent purchaser on inquiry, and further it indicates that the court will consider all the facts and circumstances, including the business experience of the purchaser and the availability of additional facts on reasonable investigation.

That is a rather broad definition under Washington law just what is constructive notice and what is a bona

fide purchaser. It seems to me that the breadth of that definition in the Miebach case -- which is consistent with prior Washington law -- but the depth of that and breadth of that definition is such that it, as applied to this case, means that at least the Briggs should have their day in court to attempt to prove that the constructive notice that they claim, in fact existed and bound the trustee.

For those reasons, it is my judgment that the case should be affirmed in part and remanded in part. Affirmed in that the order denying the plaintiffs' summary judgment should be affirmed, but the matter should be remanded for further hearing and findings of fact in accord with the oral decision I have just given.

We will enter a simple order to that effect, incorporating by reference these oral remarks, and the transcript will be attached to the order for the guidance of

counsel and the court below.

* * * * *

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Julaine V. Ryen — September 23, 1988
JULAINE V. RYEN — Date

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT TACOMA

IN RE:	
PROFESSIONAL INVESTMENT PROPERTIES OF AMERICA, Debtor.	Bankruptcy No. 86-32060T
ROBERT and GRACE BRIGGS, Plaintiffs,	Adversary No. A87-32277T
v.	
ROY KENT, TRUSTEE, and the ESTATE OF PROFESSIONAL INVESTMENT PROPERTIES OF AMERICA, Defendants.	ORDER ON SUMMARY JUDGMENT (EOD Feb. 4, 1988)

THIS MATTER coming before the court upon the Motion of the Plaintiffs for summary judgment, the Plaintiffs appearing through their attorney Desa Gese Conniff and William Beecher, and Defendant Trustee appearing through his attorney Roy W. Kent of Kane, Vandeberg, Hartinger & Walker, the court having read and considered the files and records herein and deeming itself fully advised, now makes the following

FINDINGS OF FACT

1. In October 1985, the Debtor, PROFESSIONAL INVESTMENT PROPERTIES OF AMERICA, by and through its President, William R. Bruntz, induced the plaintiffs to loan the debtor $50,000.00 on the representation that the obligation would be secured by a Promissory Note and a first position Deed of Trust on the following described real estate:

> Lots 12 thru 20, inclusive, Block 1, and Lots 1 thru 8, inclusive, Block 2, Clare O'Len Addition to the City of Buckley, Washington, according to Plat recorded in Book 40 of Plats at pages 14 and 15, which is a re-record of Plat recorded in Book 34 of Plats at pages 29 and 30, in Pierce County, Washington.

2. The Plaintiff did give the Debtor $50,000.00 and the debtor issued, through its President, William R. Bruntz, a Promissory Note dated October 10, 1985, in favor of the plaintiffs. The debtor also issued a Deed of Trust on

the same date to secure the note. The Deed of Trust was never recorded. William R. Bruntz told the plaintiffs that the proceeds from the loan were to develop the above-described property and that the Debtor was going to resell the developed property in parcels. It was the Plaintiffs' understanding and belief that the proceeds of the loan were used to develop the property in question. The Debtor gave the Plaintiffs progress reports on the development of the property.

3. At the time of the final petition in bankruptcy, the property was an asset of the estate. Although the Trustee had obtained court approval for the sale of the property, the proposed transaction was never consummated and the property remains an estate asset.

4. After the Trustee's appointment, he came into possession of copies of certain documents of the Debtor:

A Statutory Warranty Deed from Blanusa and Laffey to Professional Investment Properties of America, Inc.;

Deed of Trust dated March 29, 1985 recorded April 19, 1985 between Professional Investment Properties of America, Inc., as Grantor, and Robert O. Terrel and Lavonne E. Terrel, husband and wife, as Beneficiary;

Deed of Trust dated October 20, 1985 between Professional Investment Properties of America, Inc., as Grantor, and Robert Briggs and Grace D. Briggs, husband and wife, as Beneficiary; and

Preliminary Commitment for Title Insurance showing the only encumbrance on the property being the Deed of Trust in favor of the Terrels and certain property taxes.

5. The Plaintiffs have requested the imposition of a constructive trust or equitable lien on the property or the proceeds from the sale of the property.

From the foregoing Findings of Fact, the Court makes the following"

CONCLUSIONS OF LAW

1. Revised Code of Washington

65.08.070 provides as follows:

> A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the County where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

2. The case of In re Tleel, BAP No. CC 86-1787 (9th Cir. BAP), was filed on

October 5, 1987, and is dispositive of this case.

3. Pursuant to Section 11 USC §544, the Trustee is treated as a lien creditor and/or a bona fide purchaser as of the date of the commencement of the case.

4. As one of his strong-arm powers, the Trustee is clothed with the status of a hypothetical bona fide purchaser of real property under 11 USC §544(a) (3). In determining the rights of a bona fide purchaser, the court looks to state law.

5. Under Washington State law, a purchaser for value without actual or constructive notice of a prior interest is given bona fide purchaser status and thus priority over unrecorded interests.

6. As a hypothetical lien creditor or bona fide purchaser, the Trustee could obtain a lien against the interest of the Debtor as of the date the petition is filed, notwithstanding the

Plaintiffs' claim for a constructive trust. Matter of Torrez, 63 B.R. 754 (9th Cir. BAP 1986). 11 USC §544 prevails over any conflict with 11 USC §541(d). The Trustee holds the status of an ideal creditor.

7. Any constructive trust or equitable lien the Plaintiffs may have is inferior to the rights of the Trustee and thus void.

8. The only remedy for the Plaintiffs is as an unsecured creditor of this estate.

9. The Plaintiffs' Motion for Summary Judgment should be denied.

ORDER

The Plaintiffs' Motion for Summary Judgment is denied and Plaintiffs are deemed to be an unsecured creditor of this estate with regard to the $50,000.00.

DONE IN OPEN COURT this 3rd day of February, 1988.

/s/Robert W. Skidmore
ROBERT W. SKIDMORE
Bankruptcy Judge

PRESENTED BY:

KANE, VANDEBERG, HARTINGER & WALKER

BY: /s/ Roy W. Kent
ROY W. KENT

Attorney for Trustee

APPROVED FOR ENTRY AND NOTICE
OF PRESENTMENT WAIVED:

WILLIAM L. BEECHER

BY: /s/ Desa Gese Conniff
DESA GESE CONNIFF

Attorney for Plaintiffs

Supreme Court, U.S.
FILED
JUN 17 1992
OFFICE OF THE CLERK

No. 91-1847

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MAYNARD B. MILLER,

Petitioner,

vs.

ROBERT BRIGGS and GRACE BRIGGS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

SHAWN B. BRIGGS
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Attorney for Respondents,
Robert and Grace Briggs.

June 17, 1992

Washington, D.C. • THIEL PRESS • (202) 328-3286

I. FACTS

The pertinent facts of this case are fully and accurately set forth in the opinion of Circuit Judge T.G. Nelson. (Appended to Petition for Writ of Certiorari).

II. ARGUMENT

CIRCUIT COURT DECISIONS ARE NOT IN CONFLICT

The petitioner's primary argument for a Writ of Certiorari is founded on the mistaken belief that the decision in this case by the United States Court of Appeals for the Ninth Circuit conflicts with the holding in Cooper Grocery Co. v. Park, 218 Fed. 42 (5th Cir. 1914). No such conflict exists.

To determine whether a bankruptcy trustee achieves hypothetical bona fide purchaser status so as to avoid a prior security interest in the debtor's real

property, state law is applied. In re Washburn and Roberts, Inc., 795 F.2d 870 (9th Cir. 1986); In re Marino, 813 F.2d 1562 (9th Cir. 1987); and In re Probasco, 839 F.2d 1352 (9th Cir. 1988).

In Cooper, the Court looked to Texas law; whereas, in this case, Washington law was applied to determine the rights of the parties. Different conclusions were reached by the Courts because neither the facts nor the applicable state laws in Cooper are the same as in this case.

The Court in Cooper applied Texas State law to determine whether the trustee in a voluntary bankruptcy could avoid a deed of trust security interest in the debtor's property. The Court held that under the Texas statute an unrecorded deed of trust was invalid as

against a trustee who represented the general creditors. In this case, the United States Court of Appeals for the Ninth Circuit, as did the District Court, looked to Washington law to determine whether the trustee in an involuntary bankruptcy could avoid a deed of trust security interest held by the same people who petitioned to force the debtor into bankruptcy.

Under Washington law, constructive or inquiry notice of a deed of trust interest is sufficient to secure that interest against subsequent purchasers. Miebach v. Colasurdo, 102 Wn.2d 170, 685 P.2d 1074 (1984). Unlike the Texas statute in Cooper, recording is not required to validate a deed of trust in Washington. Miebach, Id.

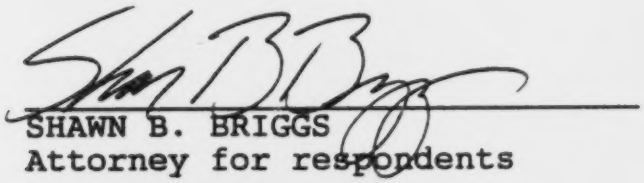
Given the specific, unique facts of this case and applying Washington law, the trustee was properly deemed to have had inquiry notice of the prior deed of trust. Therefore, under Washington law, the trustee did not achieve hypothetical bona fide purchaser status.

The considered opinion of the United States Court of Appeals for the Ninth Circuit, which affirmed the District Court's opinion, is entirely consistent with well-settled, existing law. The Court's decision in no way conflicts with any opinion of any other Circuit. Further, the unique factual circumstances of this case will give it little, if any, effect on future bankruptcy proceedings.

For the foregoing reasons, respondents Robert and Grace Briggs

respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted



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(4)

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OCTOBER TERM, 1991

MAYNARD B. MILLER,

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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In Re Professional Investment Properties of America, Inc., 955 F. 2d 623, 136 B.R. [164] (9th Cir. 1992), A2 - A26, not only squarely and directly conflicts with Cooper Grocery Co. v. Park, 218 Fed. 42 (5th Cir. 1914), but also conflicts with reported decisions from each of the U.S. District Courts that have ruled on the main issue here presented; those decisions include In Re Chappell, 77 F. Supp. 573,576 (D.C. Ore. 1948) from within the Ninth Circuit.

The main issue here is whether a reference in the initial bankruptcy court filing, to an otherwise unperfected security interest against bankruptcy estate property, renders the bankruptcy estate's right to that property subordinate to such security interest. The Ninth Circuit holding below that such a reference affords such priority to such a security interest conflicts not only with the caselaw on the point, but with the plain

language of 11 U.S.C. § 544(a); i.e., because an ideal BFP's rights would not be diminished by such a reference neither are those of the bankruptcy estate.

Cooper, supra, applied article 6824 of the Revised Statutes of Texas (1911), which is now codified within article 6627 of Vernon's Civil Statutes of the State of Texas Annotated. The Ninth Circuit below applied Revised Code of Washington 65.08.070. A13 The said Texas race-notice statute explicitly provides that unrecorded conveyances shall be void as to creditors and purchasers "without notice" thereof; the said Washington statute substitutes "in good faith" for "without notice". The phrases are synonymous for purposes of said statutes. Biles-Coleman Lumber Co. v. Lesamiz, 49 Wn. 2d 436,438-439, 302 P. 2d 198, 199-200(1956); and Weber Showcase & Fixture Co. v. Waugh, 42 F. 2d 515,521 (D.C. W.D. Wash. S.D. 1930). Respondents, at last

sentence of page 3 of their Brief in Opposition, assert that the Texas law applicable in Cooper required that deeds of trust be recorded, regardless of any other notice thereof, to have any validity. Not only does the Texas statute quoted in Cooper, as well as its successor, article 6627, plainly state that only those without notice of unrecorded interests take free of them, but Texas caselaw clearly so holds, and so held when Cooper was decided: Benton v. Jones, 220 S.W. 193,197 (Tex. 1920), and Townsend v. Seber, 264 S.W. 211, 213-214 (Tex. 1924). The Texas statute in Cooper plainly does provide that actual notice of an unrecorded deed of trust can serve to "validate" such deed of trust; i.e., cause it to have priority over any given subsequent conveyance.

Respondents distinguish the instant case from Cooper on the grounds that the bankruptcy petition in Cooper was a

voluntary one, whereas here it was involuntary. That distinction is devoid of relevance according to law. 11 U.S.C. § 103(a) provides that chapter 5 of title 11, which includes 11 U.S.C. § 544(a), applies to every case brought under chapter 11 of title 11; this case was commenced under chapter 11 of title 11. 11 U.S.C. § 544(a) plainly applies as fully to involuntary cases commenced under 11 U.S.C. § 303, as it does to voluntary cases commenced under 11 U.S.C. § 301: E.g., Bridgewater v. Schaefer, 164 F. 2d 447 (5th Cir. 1947) and In Re Lendvest Mortg., Inc., 119 B.R. 199 (9th Cir. BAP 1990).

The Ninth Circuit based its decision below on the holding that notice to the bankruptcy trustee of a security interest, via a reference thereto in the initial bankruptcy court filing, subordinates the bankruptcy estate's title to that interest. Here there is no

unique, peculiar or even atypical fact or law which will narrow the application of that unsound holding; a holding which would deprive thousands of bankruptcy estates of rights which 11 U.S.C. § 544(a) is so clearly intended to provide. The said holding of the Ninth Circuit below will change the priorities among bankruptcy creditors contrary to the will and the authority of Congress; this Court should prevent such a usurpation of policy making authority. This Court should grant review.

Respectfully submitted,

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